

4-1-1977

The Development of the Lutheran Theory of Resistance: 1523-1530

Cynthia Grant Bowman
Cornell Law School, cgb28@cornell.edu

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Legal History, Theory and Process Commons](#)

Recommended Citation

Bowman, Cynthia Grant, "The Development of the Lutheran Theory of Resistance: 1523-1530" (1977). *Cornell Law Faculty Publications*. Paper 152.
<http://scholarship.law.cornell.edu/facpub/152>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

The Development of the Lutheran Theory of Resistance: 1523-1530

*Cynthia Grant Shoemaker**
Illinois Institute of Technology

IT IS FREQUENTLY assumed, especially by political theorists, that the development of the modern theory of resistance to governmental authority was the accomplishment primarily of Huguenot writers of the late sixteenth century and that it was they who laid the foundations for the more famous seventeenth-century English theories of a right of revolution. The corollary is that Lutheran writers made little contribution to the development of this theory, if not, indeed, a negative one. Contrary to this fairly common assumption, however, the justification of resistance was a major concern of German Protestants in the early sixteenth century, and I would contend that they played an indispensable role in developing and transmitting the inchoate theories of the Middle Ages to the Calvinists of the later sixteenth and seventeenth centuries, who made of them a doctrine which could properly be termed a theory of the right of revolution.

Before proceeding to support this contention, it is important to delineate what I mean by a "mature" theory of resistance, especially since I intend repeatedly to use certain theoretical assumptions in my analysis of the early Lutheran writings. A resistance theory, properly so called, must go beyond the description or vindication of any one instance of refusal to obey and provide for its audience a justification which is capable of being generalized to cases other than the one at hand. This is essentially what we mean by the very word "theory." Moreover, a "mature" or "complete" theory of political resistance will provide answers to the following five questions:

1. May men *ever* justly resist established political authority?
2. If so, *when* may they resist?
3. By *whom* shall action be taken?
4. *How* is such resistance to be carried out?
5. If the resistance is successful, are the victors then free to reorganize the society after a new image?

These five concerns make up the components of a fully-developed theory of resistance and can be summarized as the questions of the justification, standards, agents, methods, and outcome of resistance. These were not questions

*Prepared for the Sixteenth Century Studies Conference, October 31, 1975, at Iowa City, Iowa.

which the early Protestant writers approached *de novo*, for resistance had been a concern of many during the Middle Ages as well; and it is essential in order to assess the Lutheran contribution to summarize briefly the extent to which a resistance theory had evolved by the first years of the sixteenth century, as well as the extent to which such theory formed a viable basis upon which the Protestants could build.

The Medieval Heritage

Question number one, whether men may ever justly resist established authority, was, after an initial period of reluctance based on the patristic interpretation of Paul's injunctions in Romans 13, answered in the affirmative. The idea that resistance was at times justified was generally accepted in both secular and theological writings, although it occasionally co-existed uneasily with the rest of an author's political thought. The tendency was to assume that resistance was permitted without exploring the implications for political obligation, either because the writers saw political obligation as something so natural that it hardly needed to be explained, or because they saw it as something so exceptional that resistance was not to be regarded as unusual.

Question number two, regarding when such resistance might justly be engaged in, was most frequently met with a repetition of the ancient tyrant-just king distinction. The standards for tyranny were by and large left very vague. When specified at all, such as by the civil lawyers, or when we can infer from the actions of medieval rebels what they considered the limits of their obedience to be, the standards offered revolved, with varying emphases, around a three-fold requirement: that the king maintain adequate standards of public order; that he, both by his own behavior and by his use of public power, support and protect the Christian church; and that he observe customary law, the clauses of which were not spelled out.

A variety of possibilities were offered in answer to question three, the issue of who was to apply the standards of judgment and carry out the resistance. The notion that a private individual might rid the community of a tyrannical monarch simply by assassinating him was offered by tyrannicide theorists such as John of Salisbury and, in turn, rejected by Aquinas, Marsilius of Padua, and the conciliarists, all of whom favored forms of deposition resting upon community action. Moreover, the idea that the pope might in effect depose rulers through excommunication was current among parties whose political thought rested upon the notion of a universal Christian order embracing both the secular and spiritual spheres. In actual medieval practice, however, whoever was able to resist the ruler effectively did so, and fine distinctions were disregarded in favor of "self-help." This practice did rest upon a vague belief that "the people" might overturn their own rulers and that the people were in some sense represented by their natural leaders. From this somewhat democratic view, as well as in reaction to fears about the consequences of either private or papal resistance, opinion converged upon the

necessity for public bodies to carry out such measures. It was upon this answer that there was the most agreement, and yet it was this answer which was least capable of being put into effect until and where such representative institutions actually existed.

The medieval answer to question number four, how resistance was to be carried out, was perhaps the most vague. At various times it was suggested that the proper response was to kill, depose, excommunicate, or banish the ruler — or to impose varying combinations thereof. In practice, armed warfare and whatever measures seemed most expedient were the rule. As to what might happen in the case of successful resistance (*i.e.*, question number five), I think it is fair to say that with the exception of Marsilius and possibly of the conciliarists, who said relatively little about secular tyranny, medieval theorists of resistance envisaged a reversion to the *status quo ante*. The right of resistance was regarded as a great exception, and it did not extend to a reorganization of the political and social structure. Even those theorists who implied that the people were ultimately sovereign did not, with the exception of Marsilius, base any more than an infrequent right of resistance upon this ultimate authority; the resistance represented an extraordinary entry into the political process and was not followed by any continuing participation.¹

How useful were the theories evolved by medieval thinkers to the writers who followed them? No sophisticated theoretical basis for resistance had been developed, and hence later writers had to face the whole problem of justification anew. The standards for when resistance might be undertaken were left extremely general, yet because of this very non-specificity it was possible for sixteenth-century writers to build upon and to develop them with material relevant to the new political and religious structures. Question three received the most attention in the Middle Ages; the whole issue of private versus public forms of resistance was debated in a manner which could not have helped but influence later writers. Several of the conclusions reached by medieval writers, however, such as that a private individual or the pope might take action, were obviously not consonant with Reformation social theory; on the other hand, with the emergence of “representative” institutions by the early sixteenth century, the implementation of public forms of resistance at last became possible. Protestant writers approached questions four and five on their own and displayed their own level of sophistication by dealing with these key issues at length and independently.

¹For good general surveys on the medieval heritage the reader is directed to R. W. and A. J. Carlyle, *A History of Medieval Political Theory in the West* (6 vols.; New York: Barnes and Noble, 1903); Fritz Kern, *Kingship and Law in the Middle Ages*, trans. S. B. Chrimes (Oxford: Basil Blackwell, 1948); Walter Ullmann, *Principles of Government and Politics in the Late Middle Ages* (London: Methuen, 1961); Otto Gierke, *Political Theories of the Middle Age*, trans. F. W. Maitland (Cambridge: The University Press, 1951).

Martin Luther

I have chosen to analyse the Protestants' efforts along these lines in the years from 1523 to 1530 precisely because it was during this period that Martin Luther himself staunchly opposed resistance of any kind. Again and again, under pressure from his own elector and from politicians such as Philip of Hesse, he repeated his conviction that a Christian could not in good conscience support resistance to his secular overlord, the emperor.² The first evidence that his opinion on this question was not unalterable appeared in his signature of the Wittenberg theologians' brief at the Torgau Disputation during October and November of 1530, in which they concluded that "... when we previously taught positively never to resist the established authority, we did not know that such a right was granted by the laws of that very authority which we have at all times diligently instructed people to obey."³ Although his acquiescence in 1530 was somewhat reluctant, the evidence of Luther's private correspondence and "Table Talk" after the conclusion of the Schmalkaldic League and during the years from 1530 to his death in 1546 suggests that he came increasingly to support the notion of resistance to the emperor, first on strictly constitutional grounds but ultimately on the basis of natural law as well.

Because of his vast moral authority this change in Luther's attitude was a great boon to the Evangelical princes intent upon resisting the emperor's desire to re-establish religious unity in Germany, and Luther's approval encouraged other Protestant theologians to write extensively and openly about the subject as well. Nonetheless, the development of Luther's view of resistance clearly *postdated* the elaboration of most of the key elements of what was to become the "classic" Lutheran doctrine of resistance and is thus of somewhat secondary importance for students of intellectual history. For Luther's own opinion was heavily influenced (some scholars⁴ would even say

² See, for example, *Ein Brief an die Fürsten zu Sachsen von dem aufrührischen Geist* (1524), in *D. Martin Luthers Werke* (hereafter *WA* [Weimar Ausgabe]), (Weimar: Herman Böhlau, 1883-1948), XV, 210-221; *Ermahnung zum Frieden auf die zwölf Artikel der Bauernschaft in Schwaben* (1525), *WA*, XVIII, 291-334; *Wider die räuberischen und mörderischen Rotten der Bauern* (1525), *WA*, XVIII, 357-61; Luther to the Danzig Council (May 5, 1525), in *WA Briefe* III, 483-86; *Ob Kriegsleute auch in seligem Stande sein können* (1526), *WA*, XIX, 623-62; to Chancellor Brück (March 28, 1528), *WA Briefe*, IV, 421-24; Luther to Elector Johann (March 6, 1530), *WA Briefe*, V, 258-61.

³ "Erklärung Luthers, Jonas', Melanchthons, Spalatinus und anderer Theologen und protokollarische Aufzeichnung über die weitem Voten der Theologen und Juristen" (October 26-28, 1530), in Heinz Scheible ed., *Das Widerstandsrecht als Problem der deutschen Protestanten, 1523-1546*, Vol. X of *Texte zur Kirchen- und Theologiegeschichte*, ed. Gerhard Ruhbach (Gütersloh: Gerd Mohn, 1969), p. 67. Translation mine.

⁴ See, for example, Karl Müller, *Luthers Äusserungen über das Recht der bewaffneten Widerstands gegen den Kaiser*, in *Sitzungsberichte der königlichen bayerischen Akademie der Wissenschaften, phil. - hist. Klasse*, VIII (Munich, 1915), 43-45, 52ff. and

“coerced”) by the princes upon whom his church relied and to whom he was resolutely loyal after the Protestant alliance came into existence. In any case, his notions were quite clearly derived from their previous elaboration by Evangelical princes, jurists attached to their courts, *and* by Luther’s own close theological colleagues. Thus I intend to concentrate my discussion on how arguments for resistance to the emperor, arguments based both on constitutional and on natural law, were in fact developed during this very early period by Protestant theologians, lawyers, and politicians.

The Development of Natural Law Arguments for Resistance

Luther did more, however, than merely ratify theories worked out by close associates, for he provided the other Protestants with many blocks from which to construct their theories, such as the notion of the “Two Kingdoms” and the belief that all magistrates were charged by God with the protection of their subjects;⁵ and some of his colleagues were quick to make use of them. For example, when Frederick of Saxony in 1523 asked Luther and several other theologians whether he would be justified in forcibly protecting his Protestant subjects against the emperor,⁶ Luther’s own answer was negative; but Johannes Bugenhagen contributed a separate brief disagreeing with this position. Bugenhagen acknowledged that individual Christians were obliged to suffer passively, but their princes were also required to protect them against injustice, just as they were required to protect them against robbery or murder. As servants of the law, possessors of the sword, and protectors of their people, they therefore had the right, he concluded, to resist the emperor.⁷ After the so-called “Pack Affair” of 1528 and the second Diet of Speyer in 1529,⁸ Bugenhagen developed this opinion into a lengthy brief to the Elector John. His argument was built around the two fundamental Lutheran concepts referred to above, the notion of spheres of secular and spiritual authority and the duty of the prince or magistrate to protect his subjects. The emperor’s authority, he declared, was legitimate only within a limited sphere. If he attempted to act in matters which rightfully fell within God’s sphere instead, that is, in matters of religion, the emperor was to be not

Pierre Mesnard, *L’Essor de la Philosophie Politique au XVIe Siècle* (Paris: Boivin, 1936), p. 228, both of whom feel that this opinion contradicts Luther’s whole philosophy and that he had merely given in to the princes.

⁵ Luther, *Von weltlicher Oberkeit: wie weit man ihr gehorsam schuldig sei* (1523), *WA*, IX, 245-80.

⁶ Luther, *Gutachten* (for Elector Frederick of Saxony, shortly before Feb. 8, 1523), in Scheible, p. 17.

⁷ Bugenhagen, in Scheible, p. 28.

⁸ The “Pack Affair” involved a rumor that a Catholic league was preparing to attack Protestant strongholds; at the 1529 Diet of Speyer, the emperor withdrew all past concessions to the Lutherans.

only disobeyed but also actively resisted by the princes. These rulers, although formally the emperor's inferiors, were nonetheless obligated to protect their subjects; for God had conveyed the use of the sword to them for that purpose. Such an obligation did not cease if the superior magistrate himself failed to fulfill his own duties in this respect.⁹

Such an argument bore some similarity to late medieval doctrines that the German electors shared with the emperor a responsibility for the empire and that their obligations to it continued even if he were derelict. In fact, however, Bugenhagen's notion was quite different in that he derived the princes' continuing responsibility not from any unique constitutional position but from their divine vocation. German law had less to do with the requirements of their role than did the law of God.

The same was true of the general standards which Bugenhagen delineated for the determination of when the emperor was to be resisted, that is, when he attacked the Protestants because of their faith, a matter over which "Caesar" had no jurisdiction. The only specifically legal ground for resistance mentioned in his treatise was the emperor's obligation to give the Protestants' case a hearing before condemning them.¹⁰ This right did indeed have a basis in German law, in the "electoral capitulations" which Charles V had accepted upon acceding to the imperial throne in 1519 and which included a promise not to condemn any German unheard, as well as in the whole issue of the appeals which were pending. Bugenhagen, however, unlike other writers at this time and perhaps more realistically considering what the result of an imperial or conciliar "hearing" was likely to be, did not pursue the question of legal rights in his justification of resistance. He instead voiced this right to a hearing as though it were a general, indeed, a *natural* right and inserted it into his argument almost peripherally as a "special reason for resistance" which had already been justified upon other grounds. Thus, in addressing the questions of what I have called the justification, standards, and agents of resistance, Bugenhagen was interested in what the law of God had to say about the matter, not in what the law of man said.

Likewise, when he turned to question number four, that of how any such resistance was to be carried out, Bugenhagen drew his recommendations from Luther's own description of the divinely-established role of the prince and of the Christian's duty to make use of the power of the state only out of concern for his brothers and never in self-interest.¹¹ If a magistrate were also a Christian, therefore, he would never undertake any resistance to the emperor

⁹Bugenhagen, "Bedencken, auff die Frage: ob man das Evangelium wider den Keyser, mit dem Schwerdt schützen möge?" (to Elector John of Saxony, 1529), in Friedrich Hortleder, *Handlungen und Ausschreiben . . . Von Rechtmässigkeit, Anfang, Fort- und endlichen Ausgang des Teutschen Kriegs Keyser Karls dess fünfften* (2nd ed.; Gotha: Wolfgang Endters, 1645), II, 64.

¹⁰*Ibid.*, p. 65.

¹¹Luther, *Von weltlicher Oberkeit*, WA, XI, 245-80.

on his own behalf. The individual prince should endure his superior's attack without meeting it with force as long as the matter affected only the prince's own welfare; if that of his subjects were involved, on the other hand, he was obliged to defend them. In such a case he was directed first to intercede with his superior, then to publicize the affair, and finally, if all else failed to effect a just resolution, to resist forcibly.¹² Bugenhagen clearly saw the purpose of such resistance as the coercion of the emperor into changing his course of action, but he envisaged no permanent rearrangement of authority relations in the empire. He accepted the fact that the emperor was indeed the princes' hierarchical superior and that superiors must be obeyed, but under certain exceptional circumstances the princes might nonetheless resist him.

Bugenhagen, it is true, presented these conclusions to the elector as still being somewhat tentative, and he expressed the desire that they remain secret.¹³ Nonetheless, such notions were beginning to make themselves felt upon policy. An opinion written to guide the Saxon delegates to the Schwabach discussions in October of 1529 echoed Bugenhagen's sentiments. In it the Saxon theologians, assisted by the elector's lawyers, defended resistance by the princes to the emperor in the case of an attack upon the Protestants for their faith on the grounds that spiritual matters were strictly excluded from the emperor's jurisdiction and that the princes had a duty to protect their subjects.¹⁴ This opinion thus essentially summarized and repeated the natural law arguments for resistance which Bugenhagen had been making since 1523.

Constitutional and Juridical Arguments for Resistance

At the same time, and ultimately more important in convincing Luther at Torgau, Protestant writers were constructing elaborate legal arguments in support of resistance to the emperor. The Saxon jurists handed their prince an opinion in January of 1530 concluding that such resistance was indeed justified because Charles was a constitutionally limited monarch.¹⁵ Such arguments were related to the late medieval conviction that the empire was really more of an aristocracy than an absolute monarchy, the electors being co-rulers with the emperor, with their responsibility including the duty to correct and/or depose him under certain circumstances. Arguments based upon the role of the electors, however, could not be used to justify resistance by authorities who did not belong to the electoral college under the terms of the Golden

¹² Bugenhagen, "Bedencken," in Hortleder, II, 64-65.

¹³ *Ibid.*, p. 65.

¹⁴ Hans von Schubert, *Bekenntnisbildung und Religionspolitik: 1529/30 (1524-1534)* (Gotha: Friedrich Andreas Perthes, 1910), pp. 185-87.

¹⁵ *Gutachten der kursächsischen Juristen*, in Scheible, pp. 63-66.

Bull; yet the tendency was to identify all the estates with the electors in this right. Even such an assimilation did not apply to the case of the imperial cities, though, since their constitutional position was quite different from that of the territorial states. They were directly responsible to the emperor, and their economic and political interests, as Hans Baron has pointed out, dictated a close allegiance to him.¹⁶ Nonetheless, several of these cities were staunchly evangelical, Strasbourg, Nuremberg, and Bremen being the most prominent among them. When their leaders entered into the alliance discussions of this period, some new theory was clearly required to justify resistance on their part.

Such a theory emerged from the notion of the "inferior magistrates,"¹⁷ which was best articulated by Martin Bucer of Strasbourg. Bucer pointed to the fact that in Romans 13, St. Paul had spoken not of the "power" but of the "powers" that be. The obvious conclusion, Bucer thought, was that God had ordained, as a general rule, systems of multiple authorities; thus it was that in Germany power had been conveyed to numerous authorities, as well as to the emperor.¹⁸ There were many individuals and institutions, Bucer went on to explain in a later (1535) treatise, who possessed the authority to make laws within their respective territories and to inflict capital punishment upon their subjects without obtaining the consent of the emperor; as examples he cited the estates, princes, margraves, cities, and many of the nobles.¹⁹ Even though the office of these "inferior magistrates" was received directly from the emperor, Bucer thought he was acting merely as God's agent in transmitting the sword to them.²⁰ Moreover, once it had been granted, the lesser magistrates' power was not limited by the emperor; they were, in fact, each like emperors in their own territories. Bucer's image of the German constitution thus reduced the empire to little more than a loose confederation.

Philip of Hesse, the man most actively involved in the negotiations for a Protestant League, however, was unwilling to sacrifice the theoretical unity of Germany. In his repeated attempts to gain the allegiance of Nuremberg to his

¹⁶ Hans Baron, in "Religion and Politics in the German Imperial Cities during the Reformation," *English Historical Review*, LII (1937), 406-413, discusses at length how the cities were tied to the emperor by the facts that their commercial interest demanded a strong and large political unit and that they were discriminated against in favor of the estates in the imperial diet.

¹⁷ The best discussion of the theory of the inferior magistrates is to be found in Richard Roy Benet's "Inferior Magistrates in Sixteenth-Century Political and Legal Thought" (unpublished Ph.D. dissertation, Department of History, University of Minnesota, 1964). I am greatly indebted to him for directing my attention to many critical sources.

¹⁸ Bucer, *Enarrationes perpetuae, in sacra quatuor evangelia* (Strasbourg, 1530), pp. 57-58.

¹⁹ Bucer, *Dialogi oder Gesprech von der gemeinsame* (Augsburg, 1535), no. 9, p. Viii.

²⁰ *Ibid.*, p. Xiii v.

project he outlined instead a notion of the empire as a limited monarchy. He wrote, for example, that the relationship between the emperor and the inferior magistrates was a conditional one; if the emperor departed from his duty to abide by the terms of his election and according to standards of justice in dealing with the princes and cities, then the fundamental reason for which he had been elected, the maintenance of the laws, would vanish, and with it his authority. The obligation of the inferior magistrates to protect their subjects would remain, nonetheless; they were bound to exercise it against a tyrannical emperor just as they would against the violent attack of the Turks.²¹

Philip's version of the German constitution was contradicted immediately by Lazarus Spengler, secretary to the city council in Nuremberg, who maintained that his was an imperial city and that its rulers were directly subject to the emperor, to whom they had sworn allegiance and from whom their power was derived. He implied that the situation of the other estates was similar.²² Although the inferior magistrates were rulers to their subjects, *vis à vis* the emperor they were no more than private persons: "For in this case Nuremberg is . . . no longer a ruler, but just like another individual private person and an immediate subject of the emperor."²³ The theologian Brenz elaborated upon Spengler's essentially medieval and hierarchical image of the empire by describing the Holy Roman Empire as having been established by God in three estates, the emperor being the highest, the princes the middle, and the subjects the lowest. The princes, occupying an intermediate position, were thus sometimes rulers (to their subjects) but must always behave as obedient subjects to the emperor.²⁴

Yet there was conflict even among the theologians within the city over this constitutional question. Andreas Osiander, a Nuremberg theologian who favored the entry of his city into the Protestant League, agreed with Philip of Hesse's image of the empire as a limited monarchy. The emperor had gained his authority, he claimed, by election, and his accession to the throne had depended upon the acceptance of certain conditions.²⁵ The German estates

²¹ Letter from Philip of Hesse to Margrave George of Brandenburg-Ansbach (December 21, 1529), in Scheible, pp. 44-46. See also Philip of Hesse to Luther (October 21, 1530), *WA Briefe*, V, 653-54.

²² Spengler, "Gutachten" (before November 15, 1529), in Scheible, p. 36.

²³ *Ibid.* Translation mine.

²⁴ Brenz to Margrave George of Brandenburg-Ansbach (November 27, 1529), in Scheible, pp. 40-41.

²⁵ "Ein Theologischer Rathschlag von Nürnberg: Dass nicht alle, sondern nur die ordentliche Gewalt von Gott. Unnd dass derowegen die Untere Obrigkeit im Reich wol befugt, wider die unordentliche Gewalt dess Obren, in GlaubensSachen, ihre Underthanen zu schützen," in Hortleder, II, 85. Hortleder dates this tract as 1531 and is unsure if it was written by Osiander, but Ludwig Cardauns, *Die Lehre vom Widerstandsrecht des Volkes gegen die rechtmässige Obrigkeit im Lutherthum und im Calvinismus des 16. Jahrhunderts* (Bonn: Emil Eisele, 1903), p. 15, attributes it to Osiander.

thus had no obligation to obey him, except insofar as he strictly fulfilled those requirements of his rule: "A king who is elected . . . upon specific conditions remains an authority only so long as he keeps to those conditions and the articles of the oath which he has sworn."²⁶ Moreover, the inferior magistrates within Germany were collectively of equal status to the emperor and even at times superior to him since they had the power to create the emperor and, by implication and historical precedent, to depose him as well. Thus when the emperor departed from his obligation to look after the welfare of Germany, the inferior magistrates were entirely justified in protecting their subjects against him.²⁷

Although Philip of Hesse failed to persuade Nuremberg to adhere to the League of Schmalkalden, the public airing of juridical arguments for resistance proved to be of great significance. Despite the fact that Luther and Melancthon maintained their formal opposition to resistance throughout most of 1530 (although there is evidence that Melancthon already envisaged the German electors in an ephoral role in his 1530 *Commentary on Aristotle's Politics*),²⁸ the rest of the theologians at Wittenberg do not seem to have concurred with their rejection of legal arguments. For example, an anonymous "theological opinion" presumed to have been written there in 1530²⁹ embraced the constitutional arguments described above. Although admitting that the ordinary duty of a Christian was passive disobedience, that is, to disobey but accept punishment, the authors hypothesized that perhaps the princes in the German empire could actively resist the emperor when he violated the conditions upon which he had been elected:

Thus, however, if the sovereign, who is obligated by his office and honor to seek the common good of his subjects and who was elected for that purpose, intends to take upon himself other matters which are either contrary to his charge or which do not concern it nor belong to him, but which are rather private matters or even ones otherwise disadvantageous and harmful to the common good and the empire, and thus misuses his power, which is not hereditary but to which he is elected, and under condition and oath obligated, then in such a case we could and would wish not to burden and thereby imprison the consciences of

²⁶ *Ibid.* Translation mine.

²⁷ *Ibid.*, pp. 84-85.

²⁸ "There is, therefore, another kind of kingdom, a supreme rule, but one qualified by an established law. Certain nations have supplemented their kings with guardians, who have the right of reproving the kings. Just as the Lacedaemonians added ephors, in Germany there are electors; in France there are certain princes of the *parlement*, who act as if they were the ephors of the kings," Melancthon, *Philippi Melanthonis Opera quae supersunt omnia*, ed. Karl G. Bretschneider and Heinrich E. Bindseil (28 vols.; vols. I-XXVIII of *Corpus Reformatorum*; Halle: C. A. Schwetschke and Son, 1834-1860), XVI, 440. Translation mine.

²⁹ "Ein Theologisches Bedencken," in Hortleder, II, 68. Scheible (p. 77) dates this opinion as 1530.

the lords and persons in authority who are also responsible for watching over the whole German nation, and are to be pillars of the empire, about whether they, for their poor subjects and relations, [should] not permit all unjust undertakings to their elected superior and protect themselves against it.³⁰

The theologians were clearly worried that the politicians under their spiritual care were going ahead with the intended league; and their concern for these men's souls pressed them, however tentatively, to re-examine the nature of the German constitution. Their conclusions seem close to those of Philip of Hesse. If the princes under German law were "pillars of the empire," co-rulers with its head, and shared his responsibility to look after the welfare of the whole, then they were merely acting as executors of the German constitution in protecting their subjects against him, and not in their own interest.

Thus some of the theologians in Wittenberg had, it seems, been convinced by the legal arguments put forth by the Saxon jurists and by politicians such as Philip of Hesse, indicating that the chinks in the Wittenberg "front" were in fact broader than the natural law theory of Bugenhagen might suggest. The theologians' desire to remain anonymous may be attributed to the fact that Luther was not himself convinced, yet it was ultimately arguments such as these which overcame his opposition to the proposed league of Protestant princes. In any case, the existence of this opinion clearly demonstrates that the ultimate confrontation at Torgau was not simply a debate between the Saxon jurists and a unified group of theologians.

When the elector summoned both his lawyers and parson/professors to dispute the justifiability of resistance in the darkening political atmosphere after the failure of the diet at Augsburg to resolve the religious "question," it was the jurists who did elaborate the constitutional and legal arguments in favor of Saxon membership in the proposed league. The emperor had been elected upon specific conditions, they insisted, and thus had an obligation to rule in conjunction with the estates. If he violated the laws of the empire, as he had done by proceeding against the Protestants when their appeal to a council was still pending, all their obligations to him were erased.³¹ Relying heavily upon Roman and canon law, the lawyers asserted that the princes and estates might resist the emperor in situations similar to those in which a private individual could lawfully disobey a judge and resist the execution of his sentence: when he made a ruling on a matter not within his jurisdiction; when he passed a sentence involving clear and irreparable injustice; and when the procedures for appeal were not respected. Analogously, the emperor had attempted at Speyer and Augsburg to execute his judgment in matters of religion, which did not fall within his jurisdiction; his decision was, in the Protestants' judgment, clearly wrong and involved irreparable damage in the possible loss of souls; and procedural law had been violated when the emperor

³⁰ *Ibid.* Translation mine.

³¹ *Gutachten der kursächsischen Juristen*, in Scheible, pp. 63-66.

continued to execute his judgment while the appeals were still pending.³² These were the arguments, seemingly, which led to Luther's sudden, if reluctant, change of heart at Torgau.

At this point I would like to assess the contribution of these early Lutheran arguments for a constitutionally-based resistance toward the development of a "mature" resistance theory. Bucer, Philip of Hesse, the Saxon jurists, and many of the Wittenberg theologians all agreed that the circumstances had arrived under which the emperor might justly be resisted. Many of them were not very precise, however, in defining the standards by which they had reached this conclusion. The Nuremberg theologian spoke vaguely of the emperor's "misuse" of the power of his office; others, such as the anonymous theologians, referred to the emperor's obligation to look out for the "common good" and not to invade the sphere of "private," presumably religious, affairs. Philip of Hesse was more specific about the standards for resistance as he invoked the legal conditions upon which the emperor's election was based: by violating the provisions of his electoral oath, Charles had thereby neglected his more general obligation to maintain the laws as well. This notion was very similar to medieval contractual notions and shared their vagueness. The Saxon jurists were the most specific in citing the crimes for which Charles was to be indicted; yet one nonetheless receives the impression that most of these writers had already decided that resistance to the emperor was justified and that they were not very concerned with delineating the precise moment at which he had overstepped the bounds of his authority.

In approaching question number three the Lutherans had by the early 1530s developed rather fully what was to become the distinctive Protestant answer: the groups included under the term "inferior magistrates," because of their continuing constitutional obligation to protect their subjects, were the appropriate agents of resistance. Such an answer was uniquely suited to the German situation since it provided a justification for action by the parties who were politically relevant there without inviting democratic implications. Because of their special position resistance by the inferior magistrates was justifiable "*Widerstand*" while any uprising by these magistrates' own subjects against them was termed "*Aufbruch*" and heartily condemned. Private persons had never been given the sword, nor were they assigned any special place in the princes' interpretation of the German constitution. Nonetheless, by the implication, sometimes stated outright, that obligation depended upon the consent of the party bound,³³ a dangerous inconsistency was introduced. On the terms of the constitutional argument alone there was no guarantee that similar grounds might not be used by all subjects against their rulers. Thus the

³² *Ibid.*

³³ The Nuremberg theologian insisted that the princes were bound to obey the emperor only because they had entered into a semi-contractual arrangement with him ("Ein Theologischer Rathsschlag . . .," in Hortleder, II, 84-85).

legal arguments demanded supplementation by theological injunctions against action by individuals or groups of subjects if they were to provide the delicate balance required, justifying the resistance envisaged and yet reaffirming the duty of obedience by private persons.

The necessity of dealing with question four, the means of resistance, was blithely ignored by most Lutheran resistance writers during this period. This fact was pointed out by their opponents, who insisted that no more than orderly and institutional deposition procedures were called for under the German constitution. Those who wrote in favor of resistance, on the other hand, called simply for whatever measures were necessary, a position which might be interpreted as a regression to the early medieval image of resistance as "abandonment."³⁴ It was only later, in the days immediately preceding and during the Schmalkaldic War, that Lutheran theorists turned their attention to some of the problems involved in this question.³⁵

As for question five, it is clear that the various writers dealing with the question of resistance, and even those who agreed in supporting it, had differing images of the patterns of authority in Germany. The constitutional ideas which collided included notions of the empire as a confederation, as a limited monarchy, as an absolute monarchy, and as an aristocracy. It is very hard to say which of these was an accurate description of the contemporary situation and which represented a radical deviation from the *status quo*, for the fact is that the empire was in a period of flux. In a sense Charles' desire for a universal monarchy was the most revolutionary, and his attempts to assert power within Germany were opposed by authorities with the weight of tradition on their side. The princes' response was, on the one hand, to emphasize medieval limitations upon the German monarchy and to concretize such limits by placing specific conditions upon the emperor's election. In addition to asserting such limits, however, the princes tried to provide for a continuing role by the estates in the administration of the empire. During the late fifteenth and early sixteenth centuries repeated attempts to institutionalize this participation were made, the establishment of the Imperial Cameral Tribunal in 1495 and of the Imperial Governing Council in 1500 being examples. If these institutions had succeeded in asserting their own authority over the government of the empire, Germany would have been transformed into an aristocracy. What the ineffectiveness of these institutions and the emperor's failure to assert his own will made clear, however, was that the German

³⁴ See Kern, *Kingship and Law in the Middle Ages*, pp. 86ff.

³⁵ For example, Justus Menius, *Von der Nothwehr Unterricht: Nützlichen zu lesen* (Wittenberg, 1547), in Hortleder, II, 152-171 and Basilius Monnerus, *Von der Defension und Gegenwehr, ob man sich wider der Obrigkeit unrechte Gewalt wehren, und Gewalt mit Gewalt jure vertreiben möge?* (1547), in Hortleder, II, 171-193. *Bekennntnis Unterricht und Vermanung der Pfarrhern und Prediger der Christlichen Kirchen zu Magdeburgk* (Magdeburg: Michael Lotther, April 13, 1550).

princes were increasingly subject to no authority but their own. At the very time, ironically, when the theoretical bases were being laid for a constitutional, limited monarchy, the loose confederation which actually existed was rapidly disappearing. In hindsight the replacement of the medieval structure by multiple, independent states may seem to have been inevitable, but its fate still seemed to lie in the balance for writers in the sixteenth century. And it was in fact the question with which they were then wrestling, that of resistance on behalf of religion, on which the unity of the empire ultimately foundered.

Conclusion

Soon after the Torgau Disputation an anonymous jurist published an opinion which provides a good compendium of the mix of natural law and juridical arguments which had brought the Protestants to such a momentous juncture and which ultimately blended together to produce the elaborate and sophisticated Lutheran statements of the 1540s and the famous Magdeburg *Confession* of 1550.³⁶ In approaching each of the questions involved in the delineation of a resistance theory, this author combined a whole battery of points taken both from the constitutionalists' position and also from the theological position of writers such as Bugenhagen. For example, while concerned with refuting Scriptural arguments against resistance and adducing evidence from natural law, the writer also based his justification of resistance upon the nature of the emperor's office as an elective and limited, rather than absolute, monarchy.³⁷ In approaching the question of standards for determining when resistance became justified, he referred both to the emperor's duty to abide by the conditions of his election, such as his responsibility to maintain the peace, and to his violation of the boundaries between the jurisdiction of God and that of man.³⁸ The Saxon jurists' interpretations of the canon law strictures about action which was *ultra vires*, or taken while an appeal was pending, or which involved irreparable injury were included in this hybrid opinion, as was a refutation of the counter-argument that the emperor was to be exempted from such accountability. The emperor, in the judgment of this author, was to be excluded neither from the accountability of magistrates nor from the prohibition against the taking of property by force nor from the

³⁶ "Ein nicht ungeschichteter Juristischer Rahtschlag: Das man in der GlaubensSache, sonderlich weil appelliert an ein Concilium, die Defension wider den Keyser brauchen: Auch auff was Weise, und wer im Reich Teutscher Nation widerstehen möge?", in Hortleder, II, 79-82.

³⁷ *Ibid.*, pp. 80-81.

³⁸ *Ibid.*, pp. 78, 80-81.

imposition of the ban itself, should he act in violation of the law.³⁹

Both divine and constitutional law were also invoked to support the principle that resistance was forbidden to private citizens and thus to quiet fears that the princes' subjects would make use of these arguments to justify rebellion against them as well. God had not given the sword to private individuals but only to magistrates.⁴⁰ Moreover, the princes' positions were hereditary and did not depend upon election; thus the legal-constitutional arguments could not be redirected with revolutionary consequences.⁴¹ Individuals who did not have public office must obey the authorities within their state and join battle against the emperor only upon the command of their local superiors.

Hence what was to become the "classic" Lutheran doctrine of resistance carefully blended both natural and positive law traditions although as it was refined during the 1530s and 1540s, natural law arguments came increasingly to the fore. The point in which I am most interested, however, from my choice of the period before 1530 is that so many of these arguments had appeared so early, preceding, as I have repeatedly emphasized, Luther's own development and, perhaps even more important, that of Calvinist writers as well. Bucer's and Melancthon's versions of the ephoral doctrine were available, both in Latin, to Calvin long before the famous passage about the possibility of resistance by ephoral magistrates appeared in the 1536 version of the *Institutes*, and both men are known to have been an influence, as close personal friends and/or as correspondents, upon Calvin.⁴² The early German writings were available to other French Calvinists as well.

The Huguenots, however, wrote in a qualitatively different context, that of a fledgling nation-state rather than of the multi-national imperial structure from which the Lutheran princes were attempting to secede. In terms of my five-question theoretical structure, therefore, the French Calvinists were forced to deal head on with question number five as they revived the element of popular sovereignty which had been present in some medieval theories and sought, through "popular" representatives, to participate in and to control the political structure of France. Thus we may with justice, I think, call these

³⁹ *Ibid.*, pp. 80-81.

⁴⁰ *Ibid.*, pp. 79-80.

⁴¹ *Ibid.*, pp. 81-82.

⁴² Calvin, *Institutes of the Christian Religion*, IV, xx, 31. For Calvin's many debts to Bucer, see François Wendel, *Calvin: The Origins and Development of his Religious Thought*, trans. Philip Mairet (London: Collins, 1963), pp. 76, 79, 138ff.; Hans Baron, "Calvinist Republicanism and its Historical Roots," *Church History*, VIII (1939), 36ff.; Wilhelm Pauck, *The Heritage of the Reformation* (Glencoe, Ill.: The Free Press, 1961), pp. 85-99. For his relationship to Melancthon and the latter's influence upon him, see Wendel, pp. 62-63, 134-135, and Josef Bohatec, *Calvins Lehre von Staat und Kirche* (Breslau: Marcus, 1937), pp. 82-84.

later theories genuinely theories of revolution while the Lutherans had delineated no more than a notion of limited resistance. Such an image of the evolution of modern resistance theory, however, places the Lutherans in a key position, striding between two worlds, two historical periods, two state systems, and their work forms a link between medieval and modern theories of resistance which it is indispensable to understand and recognize.